

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

NORTH AMERICAN ENCLOSURES, INC.

Employer

and

Case No. 29-RC-10007

LOCAL 348-S, UNITED FOOD AND  
COMMERCIAL WORKERS UNION, AFL-CIO

Petitioner

**HEARING OFFICER'S REPORT AND  
RECOMMENDATIONS ON OBJECTION**

This report contains my findings and recommendations regarding the Employer's contention that a union representative engaged in objectionable conduct by allegedly insulting, demeaning and threatening the Employer's President, Norman Grafstein, in front of a group of bargaining unit employees during the morning session of the election conducted on April 24, 2003. The Petitioner denies engaging in objectionable conduct. For the reasons described below, I recommend that this objection be overruled.

**PROCEDURAL BACKGROUND:**

Upon a petition filed on March 13, 2003,<sup>1</sup> by Local 348-S, United Food and Commercial Workers Union, AFL-CIO, herein called the Petitioner, the Union, or Local 348-S, and pursuant to a Stipulated Election Agreement signed by the Petitioner and North American Enclosures, Inc., herein called the Employer, and approved by the Regional Director on March 21, an election by secret ballot was conducted on April 24, among the employees in the following unit:

All full-time and regular part-time production and maintenance, shipping and receiving, plant clerical employees and drivers, employed by the Employer at its premises located at 65 Jetson Lane, 85 Jetson Lane and 973 Motor Parkway, Central Islip, New York,

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<sup>1</sup> All dates hereinafter are in 2003 unless otherwise indicated.

but excluding all office clerical employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations, showed the following results:

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|---|-----|
| Approximate number of eligible voters                         | 350 |
| Number of void ballots  | 8   |
| Number of ballots cast for the Petitioner                     | 152 |
| Number of votes cast against participating labor organization | 119 |
| Number of valid votes counted                                 | 271 |
| Number of challenged ballots                                  | 15  |
| Number of valid votes counted plus challenged ballots         | 286 |

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for the Petitioner.

Thereafter, on May 1, the Employer filed timely objections to conduct affecting the results of the election.

On June 11, the Regional Director directed that a hearing be held concerning Objection Nos. 2(a) through (e), 3(a), 4 (b), 5, 6 and 11. Further, the Regional Director recommended that Objection Nos. 1, 4(a), 7 through 10 and 12 be overruled, and approved the Employer's request to withdraw Objection No. 3(b).

On August 6, a Hearing Officer's Report on Objections was issued, recommending that Objection Nos. 2(a) through (e), 3(a), 4(b), 5, 6 and 11 be overruled.

After reviewing the record in light of exceptions and briefs, on March 17, 2004, the Board issued a Decision and Order Directing Hearing, remanding the case to the Regional Director for the purpose of conducting a hearing to resolve the issues raised by the Employer's Objection No. 9 concerning a union representative allegedly insulting, demeaning and threatening the President of the Company, Norman Grafstein, in front of a

group of bargaining unit employees during the morning voting session on April 24.

Accordingly, and pursuant to the Board's Decision and Order Directing Hearing, a hearing was held before the undersigned Hearing Officer on April 19 and 20, 2004. At the hearing, all parties were represented by counsel and were afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues and present oral argument.

Upon the entire record of this case, consisting of the transcript of the testimony<sup>2</sup> and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Employer's Objection No. 9.

### **THE OBJECTION**<sup>3</sup>

The Employer essentially contends that inasmuch as a union representative allegedly insulted, demeaned and threatened the President of the Company, Norman Grafstein, in front of a group of bargaining unit employees during the morning voting session on April 24, the election should be set aside. The Petitioner denies engaging in objectionable conduct. For the reasons described herein, I recommend that this objection be overruled.

In support of its objection, the Employer presented five witnesses, its President, Norman Grafstein, Security Guard Eddie Cuevas, Human Resources Manager Kimberly Rodriguez, and wall frame department employees Mercedes Obiedo and Biendinido

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<sup>2</sup> References to the Board's, the Employer's and the Petitioner's exhibits will be cited as Board Ex. \_\_, Employer Ex. \_\_, and Petitioner Ex. \_\_, respectively. References to the transcript will be cited as Tr. \_\_.

<sup>3</sup> As the Employer's objection is attached to the Regional Director's June 11 Report on Objections and Notice of Hearing, which is a part of the record as Board Exhibit 1(a), the objection need not be repeated verbatim here.

Reyes. The Petitioner presented one witness, its Recording Secretary, Jose Merced.

It is undisputed that there is a door to the Employer's 85 Jetson Lane facility that has a sign stating, "Notice Employees Only." (Petitioner Ex. 2) This exterior door opens into a foyer or lobby inside the facility.<sup>4</sup> (Tr. 20, 152) The foyer is essentially a 6 feet by 6 feet<sup>5</sup> enclosed room. (Tr. 38-39, 171-172, 300) On one wall of the foyer, there is a sliding glass window that looks into the security guard office. (Tr. 19, 154, 156, Petitioner Ex. 3) Additionally, about six or seven feet across the foyer from the exterior door is another door, herein called the interior door, which is an entrance to the plant. (Tr. 155-156, Petitioner Ex. 4)

The uncontradicted evidence shows that on April 24, from 8:30 a.m. to 11:30 a.m. and 4:00 p.m. to 5:30 p.m., an election was held in the cafeteria at the Employer's 85 Jetson Lane, Central Islip, New York facility.<sup>6</sup> (Tr. 15-16, 21, 96, 196) During the first polling session of the election, former employee Dahlila Sandoval entered the Employer's facility to vote in the election. (Tr. 141-142, 214) Security Guard Eddie Cuevas saw Sandoval leaving shortly after he escorted her to the line of voters; Sandoval told Cuevas that she did not vote.<sup>7</sup> (Tr. 144-145) Thereafter, Sandoval returned to the

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<sup>4</sup> Employer President Grafstein referred to this area as an entranceway or foyer. (Tr. 20) Security Guard Eddie Cuevas referred to this area as the "lobby" rather than the "foyer." (Tr. 155)

<sup>5</sup> Grafstein testified that the foyer is about 6 or 7 feet by about 5 or 6 feet, or approximately 6 feet by 6 feet. (Tr. 38-39)

<sup>6</sup> The majority of the bargaining unit employees work at the 85 Jetson Lane facility. (Tr. 15-16)

<sup>7</sup> The reason for Sandoval leaving is disputed by the parties. Security guard Cuevas testified that Sandoval told him that she did not vote because she could not wait in line, the line was too long. Union representative Jose Merced testified that Sandoval told him that Norman Grafstein, the President of the Employer, came up to her while she was in the building and told her to get out of his building and used profanity. (Tr. 297-298, 308-309) Grafstein testified that he did not recall speaking to Sandoval on the day of the election. (Tr. 34) Grafstein denies being told that Sandoval made such allegation. (Tr. 66) Grafstein was not questioned whether he made the alleged statements to Sandoval; nor did he specifically deny making such statements to Sandoval. Sandoval did not testify at the hearing. This hearsay evidence concerning Sandoval's reason for leaving the Employer's premises at this time does not establish the truth of what Sandoval said to Cuevas or Merced.

Employer's 85 Jetson Avenue facility with Union representative Jose Merced. (Tr. 25, 49, 145, 150, 172) However, the witness testimony varies significantly on what happened when Merced and Sandoval returned to the Employer's 85 Jetson Lane facility.

### **Norman Grafstein**

Employer President Norman Grafstein testified that at about sometime between 9:00 and 9:30 a.m. on April 24, while the first session of the election was being conducted, he saw Union official Jose Merced standing inside the 85 Jetson Avenue facility, at the interior door, which was open.<sup>8</sup> (Tr. 25, 49, 96) At the time he saw Merced, Grafstein was walking from the shipping office to exit the facility; Grafstein continued to walk to the interior door, towards Merced, who was about five or six feet away. (Tr. 51) Former employee Dahlia Sandoval was behind Merced in the foyer.<sup>9</sup> (Tr. 25,45, 49, 115) Grafstein testified that he thinks Sandoval had two children with her but he was not sure. (Tr. 50) Grafstein spoke first. (Tr. 51) As he was walking towards Merced, Grafstein told Merced that he had to leave, that he was not authorized to be there. (25, 49, 52, 53, 57) Grafstein testified that Merced responded that he was not leaving, calling Grafstein a "mother fucking, cock sucking, son of a bitch...screaming and hollering at the top of his lungs." (Tr. 26, 54, 118) Grafstein testified that the interior door was swung open;<sup>10</sup> Grafstein went to close the door and "Merced raised his hands"<sup>11</sup>...and he was like a

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<sup>8</sup> Grafstein testified that Merced was blocking the entranceway with the door open. (Tr. 55)

<sup>9</sup> Grafstein essentially testified on cross-examination that Sandoval was behind Merced but he did not know whether Sandoval was in the production area. (Tr.50) However, thereafter, Grafstein testified that Sandoval was behind Merced in the foyer. (Tr. 115)

<sup>10</sup> On cross-examination and later during his testimony, Grafstein explained that the interior door was not fully open (Tr. 56) and that Merced was close enough to the door that if the door swung closed it would have hit Merced. (Tr. 56, 113-114)

<sup>11</sup> Grafstein demonstrated how Merced raised his hands by raising his arms and hands straight up in the air, above his shoulders, palms facing towards each other (Tr. 97-98). Thereafter, Grafstein testified that he was not sure whether Merced's hands were clenched or open. (Tr. 98, 100)

guerilla standing in a position with his feet planted, guarding his domain. And he said I'm not leaving here."<sup>12</sup> (Tr. 26) Grafstein also testified that when Merced raised his hands, Eddie "came over and jumped in between" and told Merced to leave.<sup>13</sup> Merced initially refused,<sup>14</sup> but then he turned around and left reluctantly, escorted by Eddie. (Tr. 27) Grafstein testified that Merced never offered a reason why he was there with Sandoval. (Tr. 54-55) Grafstein testified essentially that the incident with Merced lasted about one and a half to two minutes. (Tr. 59) Grafstein testified that there could have been 85 to 110 employees on the plant floor at the time of the incident but does not know if they were all aware of what was going on. (Tr. 107, 109-111, 123)

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Grafstein, I find that I am unable to fully credit him. I find that Grafstein's testimony was, at times, internally inconsistent, inconsistent with other Employer witnesses and exaggerated. For example, Grafstein initially testified that during the incident he went to close the interior door; that Merced raised his hands and security guard Cuevas "jumped in between" and Cuevas "grabbed" Merced and that Cuevas "pushed" Merced; but Merced did not want to leave. (Tr. 26-27) Thereafter, in response to my questions, Grafstein testified that Cuevas "basically put his hands on Merced," and

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<sup>12</sup> On cross-examination Grafstein testified that, once he stopped walking and reached the interior door, he told Merced to leave the premises; Merced did not respond to his statement; however, Merced eventually left. (Tr.57-58).

<sup>13</sup> Grafstein later testified more specifically that Cuevas did not step in between the two men, but came around the side of Merced and then put his arm between Grafstein and in front of Merced. (Tr. 100, 104) This testimony is consistent with the testimony of Cuevas that he stretched his arms between Grafstein and Merced. (Tr. 174, 175)

<sup>14</sup> Grafstein initially testified that Cuevas grabbed and pushed Merced, who did not want to leave, but later in his testimony Grafstein admits that he is not sure what Cuevas did. (Tr. 100, 102, 104)

Cuevas reached up, “it was though [Cuevas] was going to block a punch or hit.” (Tr. 97-98) However, Grafstein then admitted that he did not know whether Security Guard Cuevas put his hands on Merced (Tr. 100); that Cuevas did not grab and push Merced; that he was not sure whether Cuevas grabbed and pushed Merced (Tr. 102); that he did not know what Cuevas was doing (Tr. 104); and, that Cuevas put his hand out in front of Merced. (Tr. 106) Additionally, Grafstein also testified that as Cuevas escorted Merced out of the building, Merced was fighting Cuevas (Tr. 27, 103); that Merced was pushing back (Tr. 103); and that Merced was hostile, aggressive and predatory. (Tr. 27) However, later in his testimony Grafstein admitted that Merced was not physically fighting Cuevas; rather Merced continued to yell and curse. (Tr. 102-106) It is noted that Cuevas credibly testified that Merced was not yelling and cursing at him, but at Grafstein; and, that Merced told Cuevas that he knew Cuevas was just doing his job. (Tr. 147-148, 181) Cuevas did not corroborate Grafstein’s testimony regarding Merced raising his arms in a manner that indicated he was attempting to hit anyone. Indeed, Cuevas testified that Merced did not do anything with his body, arms and legs other than trying to prevent the door from being closed in front of him; and that Merced had his hand on the interior door. (Tr. 149, 169) Further, Cuevas did not corroborate Grafstein’s testimony that Cuevas reached up as to block a punch or hit, or that he grabbed or pushed Merced, or that he intentionally touched Merced.<sup>15</sup> Similarly, Rodriguez credibly testified that she did not see Cuevas touch Merced. Accordingly, I find that portions of Grafstein’s testimony are unreliable.

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<sup>15</sup> Cuevas demonstrated how he held his hands out, palms facing each other, with his arms extended. Cuevas testified that he did not really push Merced or Grafstein, but his arms touched both of the men. (Tr. 175-176)

I do not credit Grafstein's testimony that Merced never offered a reason why he was there with Sandoval suggesting that during the incident, Merced did not say anything about Sandoval voting.<sup>16</sup> This testimony is inconsistent with the credited testimony of Employer witnesses Cuevas and Rodriguez who testified that they did hear Merced mention this issue.<sup>17</sup>

Although Grafstein admitted on direct examination that he went to close the interior door (Tr. 26), on cross-examination and thereafter, Grafstein was reluctant to confirm this testimony, admitting that he may have grabbed for the interior door. (Tr. 55-56) However, Employer witnesses Cuevas, Rodriguez and Reyes credibly testified that they saw Grafstein trying to close the interior door and Employer witness Obiedo also testified that she saw Grafstein holding the door. Thus, I find that, Grafstein physically took hold of the interior door, which was partially open, to deny entry to the production area of the Employer's 85 Jetson Lane facility.

### **Eddie Cuevas**

Security guard<sup>18</sup> Cuevas testified that on the day of the election, when he came back to his office from his usual morning rounds, he saw Dahlia Sandoval who told him that she was there to vote. Cuevas escorted Sandoval to the line. Cuevas returned to his office and saw Sandoval again. Cuevas asked Sandoval if she voted; Sandoval said that she did not vote because she could not wait on the line; that the line was too long, and she left the building. (Tr. 141-142) Thereafter, when Cuevas was away from the security

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<sup>16</sup> Tr. 54-55, 57. Grafstein also testified that it was never brought to his attention that Sandoval was with Merced for the purpose of voting. (Tr. 64-65)

<sup>17</sup> Merced's testimony is consistent with that of Cuevas and Rodriguez here inasmuch as he testified that he told Grafstein that Sandoval should have access to vote; that Grafstein should let Sandoval in to vote. (Tr. 301-302, 321)

<sup>18</sup> Tr. 141.



office, he heard yelling. (Tr. 145) Cuevas estimated that he was about 15 feet away from the area near the interior door when he heard the yelling. (Tr. 173) Cuevas walked quickly to the front. (Tr. 173, 189) Cuevas saw Merced by the open interior door and most of Merced's body was inside the plant.<sup>19</sup> (Tr. 148-149) Cuevas heard Merced yell "you can't prevent us from voting, you are nothing but a scum bag, you are a cock sucker..." Grafstein's face was red but he was not saying a word. (Tr. 146-147) Cuevas testified that Merced was trying to get into the plant from the lobby and Grafstein was trying to prevent Merced from coming in. (Tr. 171) Cuevas also testified that Grafstein was trying to close the door so that Merced stayed outside in the lobby and that Merced tried to prevent the door from being closed in front of him. (Tr. 149, 151, 169, 171, 189) More specifically, Cuevas testified that the interior door was to the side of the two men;<sup>20</sup> that Grafstein was standing in front of Merced to prevent him from coming in;<sup>21</sup> and that Merced had his hand, body and foot on the door. (Tr. 169-70) Cuevas testified that Sandoval and her child were behind Merced in the foyer at this time. (Tr. 172-173, 193) Cuevas "[got] between" Merced and Grafstein<sup>22</sup> and went in the foyer with Merced. (Tr. 147, 151, 174) Grafstein did not go into the foyer with Merced and Cuevas. (Tr. 175) Cuevas told Merced that he was unauthorized; that he had to go outside. Merced kept yelling at Grafstein; but by this time, Cuevas had Merced by the exterior door and he

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<sup>19</sup> Cuevas testified that the door was three quarters open, enough for one person to come through. (Tr. 177)

<sup>20</sup> The interior door was to the right side of Merced, who was coming from the foyer, and to the left of Grafstein, who was standing in the plant, in front of Merced. (Tr. 176-177) This is consistent with Grafstein's testimony that Merced was facing Grafstein and the plant. (Tr. 104-105)

<sup>21</sup> Tr. 177. Cuevas also testified that Merced was pushing the door one way and Merced was pushing the door the opposite way to prevent it from being closed, but later Cuevas testified that Grafstein was not pushing the door, but trying to hold Merced from coming in. (Tr. 151, 170)

<sup>22</sup> Cuevas explained that, as a security guard, he is not supposed to touch anyone, but he can put his hands out to "separate" people. Cuevas testified that he "separated" Grafstein and Merced. Cuevas demonstrated by extending his arms straight out in front of him, palms facing each other. (Tr. 147, 175)

walked with Merced outside the building (Tr. 147, 151, 180) Merced told Cuevas that he knew Cuevas was doing his job and that he would stay out on the street. (Tr. 148, 181) Cuevas testified that it took about 10 to 15 seconds to get Merced into the lobby (179-180) and about another half a minute to calm Merced down and get him to the driveway outside. (Tr. 181)

Cuevas testified that during the altercation other employees were at their posts working and on the voting line, but he could not estimate how many employees were there. (Tr. 150-151, 187-188) Cuevas testified that the closest employee to the entrance was about 10 to 20 feet away from the interior door.<sup>23</sup> (Tr. 187-188)

Turning to credibility, despite some inconsistent testimony, I find that much of Cuevas' testimony concerning the incident at hand was credible. I generally credit Cuevas' testimony that he saw Merced by the open interior door (Tr. 148-149); that he heard Merced yell "you can't prevent us from voting;" that he heard Merced curse at Grafstein;<sup>24</sup> that Grafstein tried to close the door so that Merced stayed outside in the foyer and that part of Merced's body, including his hand, was on the door;<sup>25</sup> that Sandoval and her child were behind Merced in the foyer at this time; that Cuevas extended his hands out and escorted Merced into the foyer and outside. I do not credit any testimony that may indicate that Grafstein and Merced were physically pushing each

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<sup>23</sup> Cuevas testified that he was not sure how far the line of voters had extended at the time of the incident. (Tr. 188-190)

<sup>24</sup> For the most part, all of the witnesses testify about different expletives being used by Merced. However, Merced and Grafstein consistently testified that Merced used the words son of a bitch. I do not make a specific finding on the exact profane language used by Merced other than calling Grafstein a son of a bitch.

<sup>25</sup> In this regard, as noted above, I find that Grafstein held the interior door, which was partially open, to deny entry to the production area of the Employer's 85 Jetson Lane facility.

other or the door back and forth in between them, as it is inconsistent with the testimony of Grafstein, Rodriguez and other portions of Cuevas' own testimony.

I find that at no time during this incident did Merced go beyond the entranceway/arc of the interior door. Indeed, I find that Merced stood in the threshold of the door before being escorted out.

### **Kimberly Rodriguez**

Human Resources Manager Kimberly Rodriguez was coordinating the release of voters on the day of the election. (Tr. 202, 204-205, 211) Rodriguez testified that she saw Dahlia Sandoval in the Employer's facility, standing on the voting line with her two children.<sup>26</sup> (Tr. 214) Rodriguez testified that the next thing she knew, Merced was in the factory with one or two men and they were yelling.<sup>27</sup> (Tr. 197-198, 200) Rodriguez saw Sandoval with Merced at this time. (Tr. 216, 225) Rodriguez testified that Merced said "suck my dick, F you..." Later, in response to my question as to what was occurring when she walked over to the area, Rodriguez testified that Merced was "up at" the interior door, cursing and mentioning something about Sandoval voting. (Tr. 217-218) Rodriguez testified that she saw Norman Grafstein trying to close the door and asking Merced to leave but Merced refused to leave. Merced and the other man were yelling and using profanity.<sup>28</sup> Merced was moving his arms around. (Tr. 220) Security guard

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<sup>26</sup> It is noted that on direct examination, Rodriguez was asked, among other things, what she saw and said to Sandoval. In response, Rodriguez essentially testified that Sandoval came in with her children, that she stopped by security and was let in to vote; that she stood on the line for a brief period and then said that she was not going to wait on the line, that it was too long and she would be back; and that in the amount of time it took Sandoval to go across the street and come back, she returned with Merced. (Tr. 198) However, Rodriguez' later testimony revealed that she did not see this entire string of events. (Tr. 214, 216)

<sup>27</sup> When Rodriguez first heard the yelling, she walked from the area near the cafeteria towards the area where the yelling was coming from, near the security office. (Tr. 202, 204, 217, 224) In this regard, Rodriguez testified that she could not hear specifically what was being said until she got closer. (Tr. 217)

<sup>28</sup> Rodriguez testified that they were both wearing black union jackets. (Tr. 217)

Cuevas intervened; Cuevas had his hands out (extended his arms), “kind of stepping in between” Merced and Grafstein;<sup>29</sup> Cuevas told Merced he had to leave and Merced finally “inched back into the foyer area;” Cuevas closed and locked the interior door. (Tr. 199, 218, 221-222) After the interior door was closed, Grafstein and Cuevas went into the security office and Merced and the other man were in the foyer. (Tr. 209, 211, 223) Cuevas and Grafstein told Merced to leave and Merced said to suck his dick. (Tr. 210, 225) Rodriguez testified that it took about five minutes to get Merced and the other man back into the foyer and they were in the foyer another minute or two. (Tr. 207-208, 210, 225) Rodriguez did not see Sandoval again after she saw her in the foyer and did not know if Sandoval voted. (Tr. 211) Rodriguez essentially testified that Merced and Grafstein were not very close to each other during the incident, that they were never closer than a few feet from each other. (Tr. 219, 221)

Rodriguez testified that at the time of the incident, there were about 40 to 50 employees on line waiting to vote and there were about 25 employees sitting on boxes and crates waiting to the left of the cafeteria door. (Tr. 224-225)

Turning to credibility, it is noted that certain testimony given by Rodriguez was not based on direct knowledge and is therefore unreliable. For example, Rodriguez testified on direct examination that the security guard saw that Sandoval was on a list of employees that were no longer working for the Employer but would be permitted to come in to vote, so he let her in. (Tr. 198) This is inconsistent with the testimony of security guard Cuevas. Further, in her later testimony, Rodriguez admits that the first time she saw Sandoval was when Sandoval was standing on the line waiting to vote. (Tr. 214)

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<sup>29</sup> Rodriguez testified that she did not see Cuevas touch Merced, but he might have touched him unintentionally. (Tr. 219)

Rodriguez also testified on direct examination that Sandoval left because she did not want to wait on line; that Sandoval said that she would be coming back; and, that in the amount of time it took for her to go across the street and come back, she came back with Merced and another man in a black Union jacket. (Tr. 197-199) However, Rodriguez admits that she did not see Sandoval leave the line of voters. Indeed, Rodriguez' testimony reveals that after seeing Sandoval on line, the next time Rodriguez saw Sandoval was when she was with Merced in the area near the interior door. (Tr. 216)

I specifically do not credit Rodriguez on a number of details presented in her testimony, which are inconsistent with other witness' credible testimony. For example, I do not credit Rodriguez' testimony that Sandoval was with two children when she entered the Employer's facility on the day of the election; that Merced was with another one or two men during this incident; that the interior door was fully open when Merced and Grafstein were having the confrontation (Tr. 223); and that after the interior door was closed and Merced went into the foyer, Grafstein and Cuevas were in security office while Merced and another man in a union jacket were in the foyer. (Tr. 209)

Inasmuch as her testimony revealed that she was coordinating an orderly procession of voters, I tend to credit Rodriguez' testimony that at the time of the incident, there were about 40 to 50 employees on line waiting to vote and there were about 25 employees sitting on boxes and crates waiting to the left of the cafeteria door.<sup>30</sup> I also credit her testimony that, from her view, Merced and Grafstein were not very close to each other during the incident, that they were never closer than a few feet from each other. (Tr. 219, 221) I credit Rodriguez' testimony that when she first heard the yelling,

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<sup>30</sup> This testimony is comparable to the estimate given by Obiedo that when she and a group of about 53 other employees came to vote there were already about 15 people on the line to vote.

she did not hear specifically was being said until she moved closer, to an area near the security office. (Tr. 217)

**Mercedes Obiedo**<sup>31</sup>

Wall frame department employee Mercedes Obiedo testified that on the day of the election, she went to vote between about 9:00 a.m. and 9:15 a.m. (Tr. 237) Obiedo testified that she walked with a group of about 50 to 53 other employees to the voting line. When Obiedo and her group arrived at the polling place, there were about 15 employees already in line waiting to vote. (Tr. 237-238) Obiedo testified that from her position on the line to vote, she saw Merced at the interior door, which was “a little open.” (Tr. 240-242, 248) Obiedo testified that Merced first spoke to the security guard. (Tr. 242) Obiedo noticed that Merced was talking loudly but she did not hear what he was saying.<sup>32</sup> (Tr. 244) Then Grafstein went to the interior door and told Merced that he could not come in.<sup>33</sup> (Tr. 245) Merced “was insisting to get into the place.” (Tr. 245) Obiedo testified that Cuevas asked Merced to leave. (Tr. 246) Obiedo guessed that the encounter lasted about three minutes.<sup>34</sup> (Tr. 246) Obiedo could not see if anyone was behind Merced in the foyer. (Tr. 248, 254) In response to my questions, Obiedo testified that she saw Merced waving his hands, that Grafstein was holding the interior door and Cuevas stood next to Grafstein. (Tr. 250, 252)

Turning to credibility, I do not credit Obiedo’s testimony concerning what was said during the incident, noting that during her testimony she essentially admitted that she

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<sup>31</sup> This witness testified through a Spanish interpreter.

<sup>32</sup> Obiedo, who testified that she understood a little English, did not understand most of the words used by Merced at this time, except “something like my ball.” (Tr. 246-247)

<sup>33</sup> Obiedo testified that she understood the words “No trespassing,” used by Grafstein. (Tr. 247)

<sup>34</sup> Obiedo testified that she was in the same position in the line during the entire incident. (Tr. 249)

did not hear what Merced said (Tr. 244) and did not understand most of the words used by Merced and Grafstein. (Tr. 247) I note that although Obiedo testified that she based her conclusion that Merced was insisting on getting in on what she saw and heard, her answers to questions about what she heard were problematic. In this regard, Obiedo stated that Merced said something to Grafstein like “if he could get in. He wanted to get in.” When asked the words she heard, Obiedo responded, “I don’t know if he wanted to keep controlling something but he wanted to get in.” When asked again about the words used, Obiedo responded, “he had to get in,” and “he said he could get in.” (Tr. 250-251)

However, I specifically credit her testimony that the interior door was “a little open” and that Grafstein was holding the interior door during the incident.

**Biendinido Reyes**<sup>35</sup>

Wall frame department employee Biendinido Reyes testified that on the day of the election when he was in line to vote, he saw Sandoval inside the Employer’s facility walking towards the cafeteria with a female child and then she left. (Tr. 269) Reyes testified that thereafter, he saw Merced when he was waiting on the line to vote.<sup>36</sup> (Tr. 257, 260) Merced was at the interior door almost inside; Grafstein caught the door and tried to close the door. Merced said, “If he wanted to get in nobody can stop him.” (Tr. 257, 265) Reyes testified that security guard Cuevas was at his station in the security booth and when he saw “the argument” he came around and went in between the both of them. (Tr. 258, 266) Cuevas told Merced to leave. (Tr. 259) Merced said, “You are

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<sup>35</sup> This witness testified through a Spanish interpreter.

<sup>36</sup> It is unclear whether Reyes was standing in the same place during the entire incident. In this regard, Reyes mentioned twice during his testimony that he approached the men (Tr. 259, 260), but on cross-examination when he asked whether he stayed in the same position (on line) during the entire time he saw Merced, he testified among other things, about the line to vote and talking with other employees, but nothing about approaching the area where the incident occurred. (Tr. 265)

sucking the blood of the employees.” (Tr. 259) Reyes testified that Merced spoke in English and some Spanish. (Tr. 259)

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Reyes, I do not credit his testimony that Merced was speaking in English and Spanish during this incident. I do not credit Reyes’ testimony concerning the words imputed to Merced. However, I specifically credit Reyes’ testimony that he saw Merced at the interior door, almost inside and that he saw Grafstein touching the door.

### **Jose Merced**

Local 348-S Recording Secretary Merced testified that on the day of the election, at about 8:00 a.m., he was permitted access to the Employer’s facility at 85 Jetson Lane for a preelection conference in the cafeteria. (Tr. 284) Merced was the only representative of the Union to participate in the conference. (Tr. 287) Merced saw Sandoval outside the Employer’s facility on the morning of the election. Sandoval and her daughter, who was two or three years old, entered the Employer’s 85 Jetson Lane facility. (Tr. 296, 293) Shortly after Sandoval entered the Employer’s facility, she came out trembling. Sandoval told Merced that Employer President Grafstein approached her while she was inside and whispered to her “what the fuck are you doing in my building, get out. I don’t ever want to see you here again.” (Tr. 297-298, 309) Merced assumed that Sandoval did not vote when Grafstein said this. (Tr. 310) Merced, Sandoval and her daughter walked back to the Employer’s 85 Jetson Lane facility and entered.<sup>37</sup> Once in the foyer, they saw Grafstein standing behind the glass window of the security office. (Tr. 299-300, Petitioner Ex. 3) Merced asked Grafstein if he could speak to the Employer’s attorney,

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<sup>37</sup> Merced testified that this was between about 9:30 a.m. and 9:45 a.m. (Tr. 305)



Mr. Bianco. Grafstein just started yelling, “Get the fuck out of my place, take her with you, you’re not supposed to be here, get out, get out now.” Merced again asked to speak to Bianco, stating that Sandoval should have access to vote. Grafstein said he did not give a fuck and told them to get out of the building. Merced admits that he got angry; he told Grafstein not to talk to him that way and called Grafstein a son of a bitch. Merced again asked to speak to Bianco. Grafstein continued saying get out and threatened to call the police, so Merced put his arm around Sandoval and they left. (Tr. 301-302, 321) Merced did not touch the interior door, which was closed. (Tr. 299-300, 304-305, 315-316, 317) Merced denies seeing security guard Cuevas during the incident in the foyer or anytime after the pre-election conference. (Tr. 301, 322) Merced spoke only in English during the incident that morning. (Tr. 320-321) Merced testified that no one else was with him, Dahlia and her daughter when they entered the facility. (Tr. 321) Merced was in the foyer with Sandoval for three or four minutes. (Tr. 304) Between three and five minutes after Merced and Sandoval left the facility, Bianco gestured to Merced to come over to where he was standing in the driveway. (Tr. 303, 305-306) Merced left Sandoval and went over to talk to Bianco. Merced told Bianco what Grafstein said to Sandoval; Bianco said he would take care of it and asked Merced to direct Sandoval to return back to the building with Bianco; Bianco escorted Sandoval and her daughter back into the Employer’s 85 Jetson Lane facility. (Tr. 303-304)

Merced entered the facility again that day, by himself, for the closing of the first session of the election. (Tr. 323)

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Merced, I find that I am unable to fully credit him. I note that during the hearing, Merced exhibited a tendency to be of an excitable temperament when he banged on the table in front of him and left the hearing room during the testimony of employee Reyes.<sup>38</sup> Merced's version of the incident is for the most part inconsistent with the testimony of the Employer's witnesses and is uncorroborated. Specifically, I find incredible Merced's testimony indicating that, during the entire incident while he was in the foyer, the interior door was closed and he did not see Cuevas. I find credible Merced's testimony that he told Grafstein that he should let Sandoval in to vote and that Employer attorney Bianco later escorted Sandoval back into the Employer's 85 Jetson Lane facility.

Although Merced testified that Sandoval told him that Grafstein approached her while she was inside the Employer's facility and whispered to her "what the fuck are you doing in my building, get out. I don't ever want to see you here again," this is hearsay evidence and unreliable. In this regard, the individual who had direct knowledge concerning this statement was not presented as a witness. Accordingly, although it is possible that Sandoval made such a statement to Merced, there is insufficient evidence to establish the truth of the statement. (Tr. 297-298, 309)

### **Discussion:**

Generally, a party's conduct that reasonably tends to interfere with the employees' free and uncoerced choice in an election is grounds for setting aside the election. *Baja's Place*, 268 NLRB 868 (1984). The Board considers the following

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<sup>38</sup> Tr. 259-260.

factors in making a determination as to whether employees could freely and fairly exercise their choice in an election: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among of the bargaining unit employees; (7) the effect, if any, of the misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986); *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991).

In *Phillips Chrysler Plymouth, Inc.*, *supra*, two union agents entered an employer's premises about 45 minutes before the pre-election conference, engaged in a shouting match with management representatives and belligerently and repeatedly refused to leave the premises as requested by the employer, even after the police arrived. The Board found that the union agents' conduct indicated to employees that the employer was unable to protect its property rights in a confrontation with the union. *Phillips Chrysler Plymouth, Inc.*, *supra*.

Here, the credible evidence shows that during the first session of the election on April 24, Dahlia Sandoval, a former employee of the Employer, entered the Employer's 85 Jetson Lane facility and told security guard Eddie Cuevas that she was there to vote. Cuevas escorted Sandoval and a young child to the line of voters. Within minutes,

Sandoval left the Employer's facility, stating that she did not vote.<sup>39</sup> Shortly thereafter, Sandoval and the child returned to the Employer's facility with Union official Jose Merced. From about five or six feet away, Employer President Norman Grafstein saw Merced, who was standing at the partially open interior door. Sandoval and the child were behind Merced in the foyer. As Grafstein walked towards Merced, Grafstein told Merced that he had to leave. Merced yelled that the Employer could not stop Sandoval from voting, that Grafstein was a son of a bitch and other offensive language. Grafstein stood in front of Merced and held the interior door, which was partially open, denying entry into the production area of the Employer's 85 Jetson Lane facility. Merced did not move. Security guard Cuevas intervened by extending his arms between Merced and Grafstein and asking Merced to leave. Merced turned around and left reluctantly, escorted by Cuevas. Merced continued to yell at Grafstein as he went outside. Merced told Cuevas that he knew Cuevas was doing his job and that Merced would stay out on the street. (Tr. 148, 181) The entire incident lasted about a minute and half to two minutes. There were about 65 to 75 employees waiting to vote on the production floor at the time of this incident.

After evaluating the credible evidence, I find that the incident, which lasted a minute and a half to two minutes, was not a major event. Although the raised voices and name calling would reasonably draw the attention of employees present in the production area, Merced clearly expressed that his purpose in the Employer's facility was to assist an

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<sup>39</sup> I find that there is insufficient reliable evidence to establish the reason that Sandoval left the facility.

employee in gaining access to cast a ballot in the election. Such conduct would not reasonably cause fear among the employees in the bargaining unit. Further, the credible evidence tends to show that Merced was standing by the interior door with no one there to prevent him from coming in when Grafstein first saw Merced and yelled for Merced to leave.<sup>40</sup> And, Merced left the Employer's facility almost immediately -- within two minutes-- after being directed to do so. Such conduct would reasonably suggest to employees seeing the incident that Merced had some respect for the Employer's property rights. Further, Employer President Grafstein did not back down to Merced, to the contrary, he held the interior door and denied entry, never losing control of his property. Thus, I find that Merced's conduct did not convey to employees that the Employer was powerless to protect its own legal rights in a confrontation with the Union. Accordingly the facts here are plainly distinguishable from the facts in *Phillips Chrysler Plymouth, Inc.*, supra. In these circumstances, Merced's conduct would not reasonably tend to interfere with the employees' free and uncoerced choice in the election.<sup>41</sup>

Accordingly, under all the circumstances of this case, I find that the Union's conduct is insufficient to justify setting aside the results of the April 24 election.

### **SUMMARY AND RECOMMENDATIONS**

Based upon the findings of fact, credibility resolutions, and discussion of the applicable legal principles, it is recommended that the Employer's Objection No. 9 be overruled. As the Tally of Ballots shows that a majority of the valid votes counted has

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<sup>40</sup> Merced was standing in between the area where members of the public enter (the foyer or lobby) and the plant floor.

<sup>41</sup> Although I find that there is insufficient evidence to establish that Employer engaged in misconduct in connection with the assertion that Grafstein approached Sandoval while she was inside the Employer's facility and whispered to her "what the fuck are you doing in my building, get out. I don't ever want to see you here again," I still find Merced's conduct unobjectionable.

been cast for the Petitioner, it is recommended that a Certification of Representative be issued.

### **RIGHT TO FILE EXCEPTIONS**

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party, within fourteen (14) days from the date of the issuance of this Report, may file with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C., 20570-0001, an original and eight (8) copies of exceptions to such Report, with supporting brief if desired. A copy of such exceptions together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Board. Within seven (7) days from the last date on which exceptions may be filed, a party opposing the exceptions may file an original and eight (8) copies of an answering brief with the Board. If no exceptions are filed to such Report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. Exceptions must be received by the Board in Washington D.C. before August 9, 2004.

Dated at Brooklyn, New York, this 26<sup>th</sup> day of July, 2004.

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Tracy Belfiore  
Hearing Officer  
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Brooklyn, New York 11201